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## UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Genzyme Corp.

Serial No. 75/805,820

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Before Hohein, Walters and Rogers, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Genzyme Corp. has filed an application to register the mark "SEPRAMESH" for "coated mesh for surgical procedures including hernia repair."

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with its goods,

<sup>&</sup>lt;sup>1</sup> Ser. No. 75/805,820, filed on September 22, 1999, which is based on an allegation of a bona fide intention to use such mark in commerce.

so resembles the mark "SUPRAMESH," which is registered for "nylon in mesh form used as an implant in plastic surgery," as to be likely to cause confusion, mistake or deception.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We reverse the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as

<sup>&</sup>lt;sup>2</sup> Reg. No. 1,896,905, issued on May 30, 1995, which sets forth a date of first use anywhere and first use in commerce of December 12, 1994; affidavit §8 accepted and affidavit §15 acknowledged.

<sup>&</sup>lt;sup>3</sup> The Examining Attorney, citing Trademark Rule 2.142(d), states in his brief that he "objects to the applicant's inclusion of additional evidence with the appeal brief." Applicant, in its reply brief, argues that the "objection to new evidence is unfounded," correctly noting that "the Examining Attorney fails to identify the objectionable 'new' evidence" and asserting that "all of the evidence ... submitted with the Appeal Brief appears in either the August 6, 2001 or July 31, 2000 Responses." While the documents, or the information contained therein, which constitute Exhibits A through C to applicant's appeal brief (consisting of copies of registrant's advertising for its "SUPRAMESH" nylon mesh sheets and implants and copies of applicant's registrations for marks which include the formative "SEPRA") have indeed previously been made of record, the document which is labeled Exhibit D to applicant's appeal brief (consisting of information concerning an application filed by applicant for the mark "SEPRA!" in stylized form) is new evidence and accordingly has been excluded pursuant to Trademark Rule 2.142(d) as technically untimely. Nevertheless, given the limited probative value of the latter (since it evidences only the fact that such an application was filed), it seems unnecessary to have raised an objection to inclusion in the record of evidence which makes absolutely no difference in the outcome of this appeal.

indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), two key considerations in any likelihood of confusion analysis are the similarity of the goods and the similarity of the marks.<sup>4</sup>

Turning first, therefore, to consideration of the respective goods, applicant argues that registrant's "SUPRAMESH" "nylon in mesh form used as an implant in plastic surgery" is a product which is "used by specialized surgeons, namely[,] plastic surgeons"; is "similar to nylon mesh pantyhose"; and is "used as an implant in mentoplasty augmentation (chin augmentation) and other plastic surgery." Applicant insists, however, that "[a] mesh the size of registrant's product is too small to be used in the hernia repair procedure in which Applicant's SEPRAMESH product is used."

By contrast, applicant asserts that "a coated mesh such as Applicant's would never be used as an implant in plastic surgery" as is registrant's product. Instead, applicant contends that its "coated mesh for surgical procedures including hernia repair" is a product which is "used by general surgeons in surgical procedures that are not cosmetic in nature, including hernia repair." Specifically, applicant maintains that its "SEPRAMESH biosurgical composite is a dual-component

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(absorbable and nonabsorbable), sterile prosthesis designed for the reconstruction of soft tissue deficiencies and for the reduction of adhesion formation to the prosthesis." "The coated side of the SEPRAMESH product," applicant notes, "remains in place (in the abdomen) for up to seven (7) days, separating the abdominal viscera while an adhesion-resistant mesothelial cell layer develops over the peritoneal side of the prosthesis."

Such a composite design, applicant further observes, "encourages complete tissue ingrowth of the polypropylene mesh with the abdominal wall."

Applicant concludes, therefore, that the respective goods are so different in their design and use that confusion as to their source or affiliation is unlikely, stating in summary that (italics in original):

Applicant's product consists of a specialized surgical mesh having a non-bioabsorbable layer and an absorbable layer, which unlike registrant's product, when used prevents bowel tissue adhesion to the prosthesis. If the bowel is adhered to the prosthesis, this may lead to life threatening complications such as bowel obstruction and fistulas. In contrast, registrant's product consists of a non-bioabsorbable nylon mesh which is placed on the body of the patient and promotes tissue adhesion in the body of a patient.

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<sup>&</sup>lt;sup>4</sup> The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."

As to the evidence of record retrieved from website and "NEXIS" searches, from which the Examining Attorney asserts that hernia repair, like plastic surgery, is typically performed by plastic surgeons and thus there exists an overlap of purchasers for applicant's and registrant's products, applicant contends that:

The Examining Attorney misconstrues the search results. Hernia repair is not performed by plastic surgeons. Plastic surgeons perform surface abdominal surgery to "alleviate health problems, such as ... hernia." A general surgeon, not a plastic surgeon, performs surgical procedures deep in the abdominal cavity to repair hernias.

However, as properly pointed out by the Examining Attorney in his brief, it is well settled that the goods at issue need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. It is sufficient, instead, that the goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same entity or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978) and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

Furthermore, it is well established, as the Examining Attorney correctly observes in his brief, that the issue of likelihood of confusion must be determined on the basis of the goods as they are set forth in the involved application and the cited registration. See, e.g., Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987); CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Thus, where the goods in the application at issue and in the cited registration are broadly described as to their nature and type, it is presumed that in scope the application and registration encompass not only all goods of the nature and type described therein, but that the identified goods move in all channels of trade which would be normal therefor and that they would be purchased by all potential buyers thereof. See, e.g., In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

We are therefore constrained to agree with the

Examining Attorney that, as identified in the respective

application and registration, applicant's "coated mesh for

surgical procedures including hernia repair" encompasses

products which are identical and closely related to registrant's

"nylon in mesh form used as an implant in plastic surgery," and vice versa, such as coated mesh for use as an implant in plastic surgery and a nylon mesh implant for surface abdominal hernia repair. As the Examining Attorney properly points out in his brief (italics in original):

Despite applicant's ... claims that the applicant's goods are used by "general surgeons" whereas the registrant's goods are used by "plastic surgeons," ... the simple fact is that the applicant's goods are identified as "coated mesh for surgical procedures," without any limitation as to the type of surgeons who will use the product. The only qualifying language applicant has been willing to add to the identification of goods, with regards to the purpose of its coated mesh for surgical procedures[,] is that it may be used for "hernia repair." Because applicant has used the vague word "including" in its identification of goods, the only logical interpretation is that this "coated mesh" may be used for any "surgical procedures," which may or may not include "hernia repair" depending on the consumer's medical needs. .... Since the identification of the applicant's goods is very broad, it is presumed that the application encompasses all goods of the type described, including those in the registrant's ... identification [of goods], that they move in all normal channels of trade and that they are available for all potential customers.

Although applicant, in its reply brief, emphasizes
that its "SEPRAMESH product is composed of mesh material and
coatings that are substantially different from those used by the
Registrant in its SUPRAMESH product," such specific

compositional differences (as opposed to the generalized restriction of applicant's product to a "coated mesh" and registrant's product to a "nylon" form of mesh) are not reflected in the identifications of the respective goods and thus are legally irrelevant for purposes of determining whether confusion is likely. Applicant also asserts in its reply that:

The correct reading of Applicant's description is that its product is used in surgical procedures that include hernia repair. The words "including" and "that include" are equally specific and interchangeable. The Examining Attorney's interpretation, namely that the use of "including hernia repair" is a non-exhaustive list of possible uses for Applicant's product, is wrong and finds no support in the record. There is no suggestion in any of the materials filed by Applicant that the product is for use in connection with all surgical procedures-particularly plastic surgery. ....

Had applicant desired to limit the identification of its product along the above lines, such as setting it forth as a "coated mesh for surgical procedures involving hernia repair," it could of course have done so, but the fact remains that it did not.

We concur with the Examining Attorney that a reasonable reading of the identification of applicant's goods is one in which the uses thereof includes plastic surgical procedures, as well as general ones, and encompasses procedures not involving hernia repair.

Moreover, as the Examining Attorney persuasively notes in his brief, "even if the applicant were to limit its identification of goods ... by stating that its goods were only used in 'hernia repair,' or were only used by 'general' surgeons, '" it is still the case that, as shown by the evidence of record, "[t]he goods herein are mesh products used in surgical procedures." Applicant's goods would in legal contemplation thus remain either identical in part or otherwise closely related to respondent's broadly identified product, which includes nylon in mesh form used as an implant in plastic surgical hernia repair. Contrary, furthermore, to applicant's contentions that "[t]he Examining Attorney misconstrues the search results" and that "[h]ernia repair is not performed by plastic surgeons," the record does indeed demonstrate, as illustrated by the representative samples set forth below, that plastic surgeons perform certain kinds of hernia repairs (emphasis added):

"Procedures That May be Covered by Insurance\*

Abdominal surgery, when it is performed to:

Alleviate health problems, such as back pains, sores rashes, hernia" -- http://www.plasticsurgery.org/surgery/totalpc.htm, January 24, 2001 (website devoted to topic of "Plastic Surgery and Total Patient Care");

"The repair of ventral **hernia** defects of the abdominal wall challenges both

general and **plastic surgeons**." -- <u>Plast.</u> <u>Reconstr. Surg.</u>, February 2000;

"For all these reasons, the authors warmly recommend it for **plastic surgery** in all incisional **hernias** ...." -- Chirurgia (Bucur), September-October 1998 (article headlined "The use of Plastex-type synthetic mesh in the surgery of abdominal wall defects");

"A group of 20 patients underwent plastic surgery for inguinal hernia." -- Minerva Chir., May 1998;

"Abdominal wall competence is a major concern of all **plastic surgeons** using the TRAM flap for breast reconstruction. Low **hernia** rates and adequate abdominal stability are standard expectations in abdominal wall closure. Described here is this institution's experience with the use of a large piece of synthetic mesh ...." ." -- Plast. Reconstr. Surg., March 1998;

"The employment of prosthesis in abdominal plastic surgery for incisional hernia has contributed to a remarkable improvement in the results of this surgery." -- G. Chir., October 1997; and

"Lost to followup for a couple of years, the patient again came in for treatment of his abdominal **hernia** to the **plastic surgical** service at Grady Memorial Hospital ...." -- Ann. Plast. Surg., August 1985.

Accordingly, in light of the evidence of record and the manner in which applicant's and registrant's products are identified, the respective goods must be considered as being identical in part and otherwise closely related, such that if marketed under

the same or substantially similar marks, confusion as to the origin or affiliation of the goods would be likely to occur.

Turning, therefore, to consideration of the marks at issue, the Examining Attorney maintains that "these marks are extremely similar in appearance, differing by only a single letter," and that "these marks could even be pronounced the same." In particular, the Examining Attorney contends that:

The marks in question are SUPRAMESH and SEPRAMESH. The marks are identical, save for the "u" and the "e" in the S\_PRA portions of the marks. Each of these marks ends with the identical MESH portion. Like the MESH portions, the S PRA portions of the marks could be pronounced the same. A slightly different pronunciation can be made between the "u" and the "e" in the S\_PRA portions of the marks. However, this distinction is negligible. When spoken in normal usage, the average speaker is not likely to hear the distinction between SEPRA and SUPRA, particularly where the terms come at the beginning of the marks and are followed by further sounds, namely MESH, which tend to blur the first sounds pronounced. It is important to remember that the focus is on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. Thus, where consumers will hear an "s" sound followed by PRAMESH, confusion

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<sup>&</sup>lt;sup>5</sup> While applicant makes much of the fact that, as shown by the copy of registrant's advertising which applicant made of record, registrant's mark is actually used in the format "SupraMESH," such is irrelevant and immaterial since, as the Examining Attorney correctly observes, the "SUPRAMESH" mark which is the subject of the cited registration is in the format of a typed drawing. In consequence thereof, registrant's rights in its mark extend to the term itself and not to the depiction thereof in any special form, such as "SupraMESH." See, e.g., Phillips Petroleum Co. v. C. J. Webb, Inc. 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971).

is likely. .... Accordingly, it is apparent that these marks are more than sufficiently similar under Section 2(d) of the Trademark Act.

We agree with applicant, however, that the assertion that the respective marks will be pronounced the same "is specious." While, of course, it is well settled that there is no correct pronunciation of a mark, see, e.g., Gio. Budon & C. S.p.A. v. Buitoni Foods Corp., 205 USPQ 477, 482 (TTAB 1979); Yamaha International Corp. v. Stevenson, 196 USPQ 701, 703 (TTAB 1977); and Sterling Drug Inc. v. Sankyo Co., Ltd., 139 USPQ 395, 396 (TTAB 1963), it is most likely, given the corresponding connotations (as discussed hereinafter) conveyed by the respective marks, that registrant's mark would be pronounced "SOOPRAMESH" or "SUEPRAMESH" while applicant's mark would be pronounced "SEHPRAMESH." Additionally, as applicant notes in its reply brief, the Examining Attorney "does not provide a single example of an English word in which the letter 'u' is pronounced as a short "e" or in which the letter "e" is pronounced as 'oo.'" Nonetheless, we find that in view of the fact that the marks "SUPRAMESH" and "SEPRAMESH" differ only in the second letter of each mark, such marks are highly similar overall in sound and appearance.

We further find, however, that such similarity is outweighed by a factor which the Examining Attorney's brief does

not even discuss, namely, the substantial differences in the marks at issue in connotation and commercial impression. In view thereof, we concur with applicant that when considered in their entireties, the marks are distinguishable in commercial impression, especially when the degree of purchaser care and sophistication in the selection of the products marketed under such marks is taken into proper account.

Specifically, citing the definition included below of "supra-" from an on-line dictionary, applicant points out in its initial brief that:

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<sup>&</sup>lt;sup>6</sup> Although applicant also maintains that its "SEPRAMESH" mark is part of a family of marks for "biosurgery products" which is characterized by the presence of the common term "SEPRA," the mere fact that applicant has demonstrated ownership on this record of three such registrations does not suffice to substantiate its assertion, as set forth in its initial brief, that its "'SEPRA' biosurgery products are recognized by medical professionals as originating from the same source." Aside, however, from the absence of any persuasive evidence that it has in fact created a family of marks which is recognized by the relevant purchasing public, see J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889, 1891-92 (Fed. Cir. 1991), the sole issue before us is whether the mark which applicant seeks to register so resembles registrant's mark that, when used in connection with the goods at issue, confusion is likely. Consequently, even if applicant were to demonstrate that it has established a family of marks characterized by the term "SEPRA," it would not aid or otherwise entitle applicant to the registration which it seeks. See, e.g., Hornblower & Weeks Inc. v. Hornblower & Weeks Inc., 60 USPQ2d 1733, 1737 (TTAB 2001); Baroid Drilling Fluids Inc. v. Sun Drilling Products, 24 USPO2d 1048, 1052 (TTAB 1992); and In re Lar Mor Int'l, Inc., 221 USPQ 180, 183 (TTAB 1983).

The American Heritage Dictionary of the English Language (3rd ed. 1992) at 1805 lists "supra-" as meaning, in pertinent part, as "pref. 1. Above; over; on top of": suprarenal." It is settled that the Board may properly take judicial notice of dictionary definitions. See, e.g., Hancock v. American Steel & Wire Co. of New Jersey, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953); University of Notre Dame du Lac v. J. C. Gourmet Food Imports

[T]he marks convey two different meanings. The prefix "SUPRA" connotes "above; over; on top of" (See <a href="http://www.dictionary.com/cgi-bin/dict.pl?term=supra">http://www.dictionary.com/cgi-bin/dict.pl?term=supra</a>). In contrast, Applicant adopted the prefix "SEPRA" to suggest a different meaning, namely "to set or keep apart, disunite."

. . . .

Further, the common element of the conflicting marks in this case--"MESH"--is admittedly descriptive of both ... products, thus reducing the likelihood of confusion. .... The inclusion in two marks of such a descriptive suffix is an insufficient basis to find likelihood of confusion where the initial portions of the marks are sufficiently distinguishable. See Tektronix, Inc. v. Daktronics, Inc., 187 U.S.P.Q. 588 (TTAB 1975), aff'd, 534 F.2d 915, 189 U.S.P.Q. 693 (CCPA 1976) (TEKTRONIX for electronic measuring apparatus not likely to be confused with DAKTRONICS and design for electronic voting systems).

As applicant further persuasively notes in its reply brief:

The Examining Attorney fails to address the fact that to a surgeon, the intended user of the products at issue, the prefixes "Sepra" and "Supra" connote vastly different meanings. ... "Sepra" connotes that the mesh separates certain abdominal tissues and prevents bowel tissue adhesion to a prosthesis. This function is critical to Applicant's product. "Supra" has no such connotation and only suggests, in the relevant market, that the mesh be placed "over" or "on top of" a specific area. Furthermore, the Registrant's product is used to encourage tissue adhesion, the exact opposite use of Applicant's goods. In this

Co., Inc., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); and Marcal Paper Mills, Inc. v. American Can Co., 212 USPQ 852, 860 (TTAB 1981) at n. 7.

case, the differences in ... meaning between the terms "Supra" and "Sepra" are significant and lead inescapably to the conclusion that confusion is unlikely.

Such substantial differences in connotation and in overall commercial impression are significant in the marketplace for the goods at issue and are sufficient to distinguish the marks and preclude a likelihood of confusion. Citing Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc., 718 F.2d 1201, 220 USPQ 786, 791 (1st Cir. 1983), applicant correctly observes in its initial brief that, for a likelihood of confusion to exist, "it must be based on confusion of some relevant person; i.e., a customer or user, and there is always less likelihood of confusion where goods are expensive and purchased and used by highly specialized individuals after careful consideration."

Here, according to applicant, its coated mesh for surgical procedures including hernia repair "is sold to physicians by medical sales representatives and [is initially] purchased only after a significant amount of discussion and formulary review of the product is conducted." Given the overlap, in light of the identifications of goods in the respective application and registration, between applicant's product and registrant's nylon in mesh form used as an implant in plastic surgery, it must be assumed that registrant's product

would be sold to plastic surgeons in the same or similar manner as are applicant's goods. Physicians, a class which includes surgeons, have been held to constitute "a highly intelligent and discriminating public." Warner-Hudnut, Inc. v. Wander Co., 280 F.2d 435, 126 USPO 411, 412 (CCPA 1960). Surgeons, in their capacity as buyers of applicant's and registrant's goods, are clearly sophisticated purchasers. As such, their "sophistication is important and often dispositive because sophisticated end-users may be expected to exercise greater care." Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 954 F.2d 713, 21 USPQ2d 1388, 1392 (Fed. Cir. 1992). Moreover, even if purchased for surgeons at their direction by members of a hospital administrative staff, it is still the case that, as asserted by applicant in its initial brief, the goods at issue herein "are important patient carerelated products such that purchasers and users are certain to exercise a high degree of care and consideration in making the purchasing or use decision" and such decision plainly will not be made on impulse.

In consequence thereof, we conclude that the sophisticated purchasers of applicant's and registrant's goods can be expected to be highly cognizant of the substantial differences in connotation and overall commercial impression between applicant's "SEPRAMESH" mark for its coated mesh for

surgical procedures including hernia repair and registrant's "SUPRAMESH" mark for its nylon in mesh form used as an implant in plastic surgery. Inasmuch as such careful and discriminating purchasers will thus readily distinguish the marks, confusion as to the source or sponsorship of the respective goods is not likely. See, e.g., In re Digirad Corp., 45 USPQ2d 1841, 1845 (TTAB 1998) [no likelihood of confusion between the mark "DIGIRAD" for gamma radiation sensors, signal processors and display apparatus for us in medical isotopic tracing and nuclear imaging and mark "DIGIRAY" and design for electronic digital xray system comprised of an x-ray scanning beam tube and detector for medical use because, inter alia, "the knowledgeable purchasers of the ... goods, who are also likely to be knowledgeable about the distinctions between the fields of Radiology and Nuclear Medicine, will be acutely aware of the differences in connotation between the term RAY and RAD and, thus, will easily distinguish between the marks DIGIRAY and DIGIRAD based upon the connotations of RAY and RAD in connection with the ... respective goods"].

Decision: The refusal under Section 2(d) is reversed.